Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 29,1993

Mr. Kevin T. O'Hanlon
Chief Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR93-382

Dear Mr. O'Hanlon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19324.

The Texas Education Agency (the "agency") has received a request for information relating to applications for the approval of driving safety course materials reviewed and approved under section 6701d(143A)(d), V.T.C.S. Specifically, the requestor seeks:

> 1. Any and all documents for the years 1991 to the present concerning the application and or approval of teaching an innovative driving safety or defensive driving course format.
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> 2. Any and all documents received or created by your division since June 20, 1991 concerning innovative delivery or presentation methods not specified by the S.B.O.E. rules or the memorandum of understanding concerning drivers education or driving safety education.

You have submitted to us for review the information responsive to the request. You do not seek to withhold the requested information under section 3(a) of the Open Records Act, but believe that third-party interests are implicated that warrant our review.

Pursuant to section 7(c) of the Open Records Act, we have notified the companies whose interests may be affected by disclosure of the information submitted to us for review. In response, we have received letters from Amundson & Associates, Inc., ("Amundson") and the attorney representing U.S.A. Training Company, Inc., U.S. Interactive, and Icom, Inc. (collectively referred to as "U.S.A. Training"). Both parties

contend that the requested information is protected from disclosure by section 3(a)(10) of the Open Records Act.[1]

Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no

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[1]We did not, however, receive a response from the other notified companies. Because we have no basis to withhold the information under section 3(a)(10), the information concerning these companies may not be withheld from required public disclosure under section 3(a)(10). *See, e.g.*, Open Records Decision Nos. 405, 402 (1983).

argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6.[2]

The documents at issue here were submitted to the agency for purposes of evaluating proposed driving safety courses and determining if the proposed courses comply with rules promulgated by the State Board of Education. *See* V.T.C.S. art. 6701d, § 143A(d); 19 T.A.C. § 176 *et seq.* The documents include proposed course materials and procedures, including video scripts, student course evaluation forms, documentation of the developmental process, plan of implementation, sample examination questions, and marketing information. In addition, the documents include forms issued by the agency and completed by the applicants and correspondence from the agency to the applicants concerning the agency's review and evaluation of the submitted materials. The documents submitted to us for review were voluminous, and we resubmitted them to the respondents, instructing them to mark the documents to correspond to the trade secret arguments they asserted. U.S.A. Training marked the information which it seeks to withhold under section 3(a)(10) and returned them to us. In response to the Restatement criteria, U.S.A. Training asserts that the marked information "is so unique that it is patentable," is not known outside the company, contains provisions restricting disclosure of program materials to other parties, has required three years and $300,000 of research and development, and would be difficult for competitors to duplicate. On the basis of these arguments, and having examined the information submitted to us for review, we conclude that U.S.A. Training has made a *prima facie* case establishing that the marked information contains "trade secrets" that must be withheld from required public disclosure under section 3(a)(10) of the Open Records Act.[3] However, the information that U.S.A. Training has not marked must be released.

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[2]The six factors that the Restatement gives as indicia of whether information constitues a trade secret are

> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939) *Id.*; *see also* Open Records Decision Nos. 319, 306 (1982); 255 (1980).

[3]Internal operating or business information, as well as technological processes or ideas, may consitute a trade secret. *See* R. Callmann, The Law of Unfair Competition, Trademarks, and Monopolies §§ 14.06, 14.09; Annot., 59 A.L.R. 4th 641; *see, e.g., Gonzales v. Samora*, 791 S.W.2d 258 (Tex. App.--Corpus Christi 1990, no writ) (evidence supported status of business procedures and forms as trade secrets).

While Amundson advises us that its program "is totally unique," that it is known to only one individual, entailed years of research costing thousands of dollars, and that release of information relating to it "would compromise the establishment of the program," Amundson, has not returned the requested information to us, indicating those portions to which its trade secret arguments apply. Accordingly, we are unable at this time to determine whether Amundson has made a *prima facie* case establishing that the requested information contains trade secrets. Accordingly, unless the documents are marked and returned to us within seven days of receipt of this letter, we will presume that they have been released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/GCK/lmm

Ref.: ID# 19324
ID# 19625
ID# 19639
ID# 19729

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